

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DYLAN J. AND MEGHANN A. WHEAT : **DETERMINATION**
 : **DTA NO. 831088**
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2021. :

Petitioners, Dylan J. and Meghann A. Wheat, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2021.

On June 2, 2023, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Stefan Armstrong, Esq., of counsel) submitted documents in support of dismissal. Petitioners, appearing pro se, submitted their response by August 17, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Dylan J. and Meghann A. Wheat, a notice of deficiency, bearing assessment number L-054872997, dated March 23, 2022, for the year 2021 (notice). The notice was issued to petitioners at an address in New Hartford, New York.

2. On August 17, 2022, petitioners filed a petition with the Division of Tax Appeals in protest of the notice. Their address listed on the petition is the same New Hartford, New York, address listed on the notice.

3. On June 2, 2023, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the notice was issued on March 23, 2022, but the petition was not filed until August 17, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted among other documents: (i) an affirmation, dated July 25, 2023, of Stefan Armstrong, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated July 11, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated July 11, 2023, of Susan Ramundo, a manager in the Division's mail room ; (iv) a "Certified Record for – DTF-962-F-E - Not of Def Follow Up / DTF-963-E – Notice of Determination" (CMR) postmarked March 23, 2022; (v) a copy of the notice of deficiency, dated March 23, 2022, together with the associated mailing cover sheet; and (vi) a copy of petitioners' e-filed form IT-201, New York State resident personal income tax return for the tax year 2021 (2021 tax return),

filed on March 14, 2022. The address listed on the 2021 tax return is the same address as listed on both the petition and the notice and was the last known address for petitioners at the time the notice was issued.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst and Director of MAPS since August 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. CARTS generates the CMR. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing.

Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "3/23/22." The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

7. The CMR, dated March 23, 2022, consists of 120 pages and lists 1,574 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Denier notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A United States Postal Service (USPS) representative affixed a postmark dated March 23, 2022 to each page of the CMR, wrote the number "1,574" next to the heading "Total Pieces Received at Post Office" on page 120, and initialed or signed the last page of the CMR.

8. Page 100 of the CMR indicates that a notice with certified control number 7104 1002 9735 1615 1278 and reference number L-054872997 was mailed to petitioners at the New Hartford, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit B, bears this certified control number and petitioners' names and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed

on the CMR, by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Denier affidavit as exhibit A contains a USPS postmark dated March 23, 2022. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 1,574 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on March 23, 2022.

10. According to the Denier and Ramundo affidavits, the notice was mailed to petitioners on March 23, 2022, as claimed.

11. In response to the notice of intent to dismiss petition, petitioners submitted, among other documents: (i) a letter from the United States Department of the Treasury, Bureau of the Fiscal Service, dated February 22, 2023, issued to petitioner Meghann A. Wheat informing her that part of her federal income tax refund was applied to the subject notice herein in the amount of \$2,100.63; (ii) form 8379, injured spouse allocation dated March 23, 2023; and (iii) a copy of petitioners' form 1040 U.S. individual income tax return for the tax year 2020 with attachments. Petitioners failed to address the timely filing of their petition, but rather, argued the merits of the underlying notice.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law

§§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) "if the time to petition for such hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

A motion for summary determination may be granted:

"if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

C. Where, as here, the timeliness of a taxpayer's protest of a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*;

Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing statutory notices.

The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice was mailed, as addressed, on March 23, 2022. Further, petitioners' address on the notice, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioners' 2021 tax return. This was petitioners' last known address prior to the issuance of the notice. Thus, it is concluded that the Division properly mailed the notice on March 23, 2022, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date.

D. A taxpayer may protest a notice by filing a petition for a hearing within 90 days from the date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Here, the petition was not filed until August 17, 2022, a date that falls beyond 90 days after the March 23, 2022, date of issuance of the notice. Accordingly, the petition was untimely filed, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

E. The petition of Dylan J. Wheat and Meghann A. Wheat is dismissed.

DATED: Albany, New York
November 2, 2023

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE